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No. 07-1410

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

NAVAJO NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICI CURIAE PEABODY WESTERN COAL COMPANY AND SOUTHERN CALIFORNIA EDISON COMPANY IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

Amici curiae are an energy company that mines coal under the leases at issue in this case and an electric utility that has purchased that coal for use in generating electrical power. The Navajo Nation (the "Tribe") has sued *amici* in related actions based on the same events that led to this suit. *Amici* thus have a direct interest in the outcome of this litigation. At the same time, *amici* have an interest in the articulation of clear rules for future dealings with Indian tribes – an interest frustrated by the Court of Appeals' adoption of amorphous common law trust duties in this case.[1]

Amicus Peabody Western Coal Company and its affiliates ("Peabody") have mined coal under two leases with the Tribe (and a third lease with the Hopi Tribe) since the mid-1970s. A significant share of the coal produced under these tribal leases was dedicated to the Mohave Generating Station in Laughlin, Nevada. *Amicus* Southern California Edison Company ("SCE"), an electric utility company that serves a population base of over 13 million customers in central and southern California, is a co-owner and operating agent of the Mohave plant. Both *amici* have an interest in paying a fair royalty

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[1] *Amici* timely notified counsel of record for both parties of their intent to file this brief, and both parties have consented in letters lodged with the Clerk of Court. *Amici* further state that no counsel for either party authored this brief in whole or in part. Additionally, no party or counsel for a party – or any person other than *amici* – made a monetary contribution intending to fund the preparation or submission of this brief.

for coal, and SCE has a related interest in protecting millions of utility consumers from higher monthly bills resulting from unreasonably high fuel costs. The 12.5% coal royalty rate approved by the Secretary of the Interior ("Secretary") in this case is, and has been, the customary and prevailing rate in federal and Indian coal leases for more than twenty years.

The Tribe has separately sued *amici* in federal court based on the same events that gave rise to this suit. In 1999, the Tribe sued *amici* in the U.S. District Court for the District of Columbia, alleging common law causes of action for interference with the alleged fiduciary relationship between the government and the Tribe, aiding and abetting breach of duties arising from that relationship, and related tort and contract claims, as well as alleged violations of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* *See Navajo Nation v. Peabody Holding Co., et al.*, No. CA-99-0469-EGS (D.D.C.).[2] After this Court issued its prior opinion in this case, *amici* filed a motion for summary judgment in the D.C. District Court. That court denied the motion, based in large part on the Federal Circuit's treatment on remand of this Court's

[2] On the same day the Tribe filed its complaint in this case in the Court of Federal Claims, it also sued *amicus* Peabody in the U.S. District Court for the District of Arizona. *Navajo Nation v. Peabody Coal Co.*, No. 93-2342-PCT-SMM (D. Ariz.). That action, which is still pending, seeks rescission and reformation of the 1987 lease amendments at issue in this case, as well as restitution.

prior decision. *See Navajo Nation v. Peabody Holding Co.*, 314 F. Supp. 2d 23, 26 (D.D.C. 2004) (citing *Navajo Nation v. United States*, 347 F.3d 1327, 1328 (Fed. Cir. 2003)).

Amici appear in this case to demonstrate that the Federal Circuit erred in its interpretation of this Court's prior decision. This Court found that the Secretary had not violated any duty when he heard a plea for further negotiations from one of the parties and deferred resolution of a pending administrative appeal for that purpose. The Tribe is not entitled to reargue this Court's prior decision. But in any event, the Secretary's actions during that administrative appeal and in later approving the negotiated amendments to Peabody's leases complied with the only applicable substantive statute and generally applicable procedural regulations. The Federal Circuit erred in inventing other duties and superimposing them on that pre-existing scheme.

SUMMARY OF ARGUMENT

This Court's decision in *United States v. Navajo Nation*, 537 U.S. 488 (2003) (*"Navajo I"*), should have ended this case. There, the Court decided that the Tribe is not entitled to recover damages relating to the Secretary's approval of the coal lease amendments at issue here. The Court focused on the statute that specifically established the Secretary's lease approval function – the Indian Mineral Leasing Act ("IMLA"). Because IMLA does not contain "*any* trust language with respect to coal leasing," 537 U.S. at 508, the Court held that it imposes no fiduciary duties. When the Tribe raised the same network of unrelated statutes that it raises here, the Court

concluded, "we have no warrant from any relevant statute or regulation to conclude that [the Secretary's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." *Id.* at 514.

Notwithstanding that broad rejection, the Court of Appeals on remand erroneously resurrected the Tribe's claim based on the same hodgepodge of unrelated statutes and regulations. But if the statute most pertinent to Secretarial approval of coal leases (and amendments thereto) does not impose fiduciary duties, other unrelated statutes that do not speak to that approval function cannot do so.

Nor can the common law of trusts impose fiduciary duties on the government where a federal statute does not create such duties. This Court has instructed that the government's fiduciary obligations are defined by statute and regulation: "[T]he analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo I*, 537 U.S. at 506. The Court's decision in *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), decided on the same day as *Navajo I*, does not dictate otherwise. That case does not permit a court to use the common law either to *establish* fiduciary duties not found in statute or regulation or to *vary* applicable statutory and regulatory prescriptions. *See id.* at 479-81 (Ginsburg, J., concurring). Rather, that decision looks to the common law to determine the availability of damages in very narrow circumstances where a statute, on its face, both establishes an express trust and empowers the United States as

trustee to use and occupy the trust corpus for its own purposes. *Id.* at 474-76; *see also id.* at 480 (Ginsburg, J., concurring). Here, by contrast, this Court has already concluded that the relevant statutes and regulations do not impose any applicable duties, leaving no role for the common law.

Moreover, the particular use that the Tribe seeks to make of the common law – to import vague duties into an otherwise defined administrative scheme – runs afoul of a bedrock administrative law principle that courts may not engraft procedural requirements on those already imposed by statute and regulation. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990). The Federal Circuit's adoption of trust principles here is an invitation to courts to override carefully crafted administrative schemes that accommodate competing interests.

The record developed on remand only reinforces *Navajo I*'s conclusion that the Secretary did not breach any fiduciary duties. That evidence confirms that the Tribe took full advantage of the *ex parte* procedures permitted by applicable regulations; that it knew full well that the Secretary had directed the stay of Peabody's appeal; that it was aware of its right to request either an immediate decision or more formal review by the Department's Board of Indian Appeals; and that it opted instead to negotiate with *amici* to resolve a range of open issues.

In particular, additional evidence submitted into the record reconfirms that the Tribe sought by

negotiation to obtain economic benefits unavailable through the administrative appeal, which addressed only the royalty rate on one of the Peabody leases. In the negotiated lease amendments, the Tribe not only obtained a rate of 12.5% on Lease 8580, which contained an adjustment clause, but also a similar increase in the royalty on Lease 9910, which did not. *Navajo I*, 537 U.S. at 498 & n.5. In its prior decision, this Court found that this royalty rate exceeded the mandatory regulatory floor of 10 cents and matched the customary federal and Indian lease rate of 12.5%. Evidence newly submitted on remand confirms that this rate was customary; that the Tribe repeatedly agreed to it in other tribal leases; and that, in 1998, with full knowledge of the relevant events, the Tribe negotiated the same 12.5% royalty rate in further amendments to its Peabody leases.

Thus, the prior holdings of this Court have been confirmed by subsequent additions to the record. The Tribe still has not shown that the government breached any duty.

ARGUMENT

I. THE RELIEF GRANTED BY THE FEDERAL CIRCUIT IS FORECLOSED BY THIS COURT'S PRIOR DECISION

The Federal Circuit's judgment should be reversed for the simple reason that this Court has already decided all of the relevant legal questions in this case. In *Navajo I*, the Court not only analyzed the Tribe's argument that the Secretary breached fiduciary obligations under IMLA, but also considered and rejected the claim of breach under the same litany of unrelated federal statutes and

regulations relied upon by the Federal Circuit to reinstate its judgment on remand.

The Tribe argued in *Navajo I* that "[f]ederal statutes and regulations govern virtually every aspect of surface coal mining on Indian lands. . . ." Brief for Respondent at i, *United States v. Navajo Nation,* No. 01-1375. In particular, it cited the same statutes that later formed its regulatory "network" argument on remand. *Id.* at 1, 20-29. *Navajo I* considered and rejected the Tribe's reliance on statutes and regulations beyond IMLA: "[W]e have no warrant *from any relevant statute or regulation* to conclude that [the Secretary's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." 537 U.S. at 514 (emphasis added).

In fact, the Court expressly addressed those statutes that even arguably related to Secretarial approval of tribal mining leases, rejecting the Tribe's reliance on 25 U.S.C. § 399 and the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101 *et seq*. *See* 537 U.S. at 509. The fact that the Court did not expressly dismiss each of the remaining cited statutes and regulations was not an indication that they were beyond the scope of the Court's opinion; rather, it merely underscored their irrelevance to the breach of duty alleged by the Tribe.

Had the Court not already rejected the network of statutes and regulations on which the Tribe now relies, the Tribe's network argument still would not change the result here. In focusing its analysis on IMLA, *Navajo I* already addressed the statutory and regulatory scheme most relevant to the Secretary's

approval function. Nothing in the Tribe's scattershot approach of relying on general statutes and regulations unrelated to tribal coal lease approvals supplants IMLA's prescriptions.

In support of its "network" theory, the Tribe seeks to align this case with the second of this Court's two *Mitchell* decisions. *Compare United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*") *with United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*"). But the Tribe has it exactly backwards. The Tribe's current "network" is more like the general law found insufficient to support enforceable duties in *Mitchell I* than the specific statutes found enforceable in *Mitchell II*.

In *Mitchell I*, this Court rejected a tribe's argument that enforceable duties relating to management of timber resources on allotted reservation lands arose under the General Allotment Act ("GAA"). The GAA allotted lands to tribal members and provided that the United States would retain title in trust for the benefit of individual allottees. Because the GAA was silent on the government's management of timber resources on allotted lands, the Court held that it "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government" to manage those resources. *Mitchell I*, 445 U.S. at 542. Notably, the Court held that it was not considering the allottees' argument that other, more targeted statutes might render the government liable for timber mismanagement and invited the lower courts to consider those statutes on remand. *Id.* at 546 & n.7.

In *Mitchell II*, the Court found duties in a series of statutes specifically directed at the alleged wrongdoing – mismanagement of Indian timber and the proceeds of timber sales. The Court held that federal statutes and regulations established "'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber." 463 U.S. at 222 (citing 25 U.S.C. §§ 406-07, 466, and implementing regulations). The statute "empowered the Secretary to sell timber on unallotted lands and apply the proceeds of the sales for the benefit of the Indians. . . ." *Id.* at 220 (citation omitted). At the same time, "detailed regulations" made the Secretary responsible for implementing a regulatory program "address[ing] virtually every aspect of forest management. . . ." *Id.* Because the relevant statutes and regulations specifically addressed the particular Secretarial mismanagement alleged by the tribe, the Court held that the government had enforceable duties "in the management and operation of Indian lands and resources. . . ." *Id.* at 226.

The Court reiterated the importance of a specific statutory source of duties in its later discussion of the *Mitchell* decisions in *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003). In *Mitchell I*, the Court explained, "[t]he general trust" provision of the GAA "established no duty of the United States to manage timber resources. . . ." *White Mountain Apache*, 537 U.S. at 470. The statutes and regulations at issue in *Mitchell II*, by contrast, "specifically address[ed] the management of timber on allotted lands" and defined a "'pervasive' [federal] role in the sale of timber from Indian lands

under regulations addressing 'virtually every aspect of forest management.'" *Id.* at 474 (citations omitted).

Here, the Court has already addressed the statutory scheme most applicable to the Secretary's lease approval function and found it insufficient to give rise to any duty. *Navajo I,* 537 U.S. at 506-07. There is no reason to reach a different conclusion based on the generic "network" on which the Federal Circuit based its judgment. As the government persuasively argues, those statutes address an array of unrelated obligations, such as the collection, accounting and auditing of royalties under tribal *oil and gas* leases in the Federal Oil and Gas Royalty Management Act, *see* 30 U.S.C. § 1702(5) (defining "lease" as contract for extraction of oil and gas); the inclusion in tribal leases of provisions relating to protection of the environment under a section of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1300; and the administration of a long-lapsed "program" of studies under the Navajo-Hopi Rehabilitation Act of 1950 ("Rehabilitation Act"), 25 U.S.C. §§ 631 *et seq*. None of those general statutes supplants the specific provisions of IMLA and its implementing regulations relating to Secretarial approval of tribal mineral leases. IMLA is the beginning and the end of the inquiry.

II. THE COMMON LAW CANNOT ALTER THE UNITED STATES' OBLIGATIONS UNDER APPLICABLE STATUTES AND REGULATIONS

Were this Court to re-examine the network of statutory, regulatory and common law sources re-asserted by the Tribe, the Tribe's argument would still founder on the threshold requirement that the Tribe demonstrate the existence of a specific duty relating to the challenged government conduct: "To state a claim cognizable under the Indian Tucker Act, . . . a Tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Navajo I*, 537 U.S. at 506 (citation omitted).

The Court of Appeals purported to find specific duties in two sources. First, it concluded that the common law of trusts "helped to define the 'contours of the United States' fiduciary responsibilities.'" *Navajo Nation v. United States*, 501 F.3d 1327, 1346 (Fed. Cir. 2007) (citation omitted). Specifically, "common law trust duties of care, candor, and loyalty help define the fiduciary responsibilities in this case." *Id.* Second, it found "enumerate[d] specific duties" in certain of the statutes and regulations included in the Tribe's network, including the duty to keep the Tribe informed and to include in a lease any terms requested by the Tribe. *Id.* The United States has thoroughly addressed the various statutory and regulatory sources of alleged duties; thus, *amici* focus here on the Court of Appeals' misuse of the common law to impose duties on the Secretary.

Because IMLA and Interior Department regulations address the Secretarial actions challenged by the Tribe, the common law has no role to play. The common law of trusts cannot override or vary the balance of interests represented in IMLA and applicable agency regulations. Moreover, under well established principles of administrative law, courts cannot augment agency administrative procedures through the common law.

A. The Court of Appeals Improperly Grounded the Secretary's Obligations in the Common Law of Trusts

The common law of trusts cannot establish governmental fiduciary duties to an Indian tribe. This Court has held that federal *statutes* and *regulations* establish any fiduciary duties and "define the contours of the United States' fiduciary responsibilities." *Mitchell II*, 463 U.S. at 224. Where a statutory and regulatory scheme speaks directly to the duty that is allegedly breached by the government, that is the end of the inquiry. Both the *existence* of the duty and its *scope* are defined by statute and regulation. *See id.* Accordingly, *Navajo I* reiterates that the breach-of-duty analysis "must train on *specific* rights-creating or duty-imposing *statutory or regulatory prescriptions*." *Navajo I*, 537 U.S. at 506 (emphasis added). As this Court has already determined that the statutory scheme governing the Secretary's lease approval function – the IMLA – does not give rise to any duties, the common law of trusts cannot be used to contradict that conclusion.

The Court of Appeals misunderstood the limited role that the common law of trusts may play in the Indian Tucker Act inquiry. In *Mitchell II*, the Court concluded that general trust principles can "reinforc[e]" the construction of statutes and regulations as mandating compensation for their breach. *Mitchell II*, 463 U.S. at 225. But those principles do not play a role in the threshold inquiry of whether a duty exists. That question must be answered by reference to the text of a statute or regulation: "Although 'the undisputed existence of a general trust relationship between the United States and the Indian people' can '*reinforc[e]*' the conclusion *that the relevant statute or regulation imposes fiduciary duties,* that relationship alone is insufficient to support jurisdiction under the Indian Tucker Act." *Navajo I*, 537 U.S. at 506 (citations omitted) (emphasis added).

In order to reach the contrary conclusion, the Federal Circuit relied on *White Mountain Apache*. *See* 501 F.3d at 1346. But *White Mountain Apache* does not support the broad proposition that the common law establishes duties beyond those created by statute or regulation. In *White Mountain Apache*, the Court found fiduciary duties established by a 1960 statute that both created an express trust as to specific property and authorized the United States to occupy and to use the trust property. 537 U.S. at 474-75. The 1960 statute "expressly define[d] a fiduciary relationship in the provision that Fort Apache be 'held by the United States in trust for the White Mountain Apache Tribe.'" *Id.* (footnote and citation omitted). Unlike the GAA's creation of a "bare" trust in *Mitchell I*, *see* 445 U.S. at 542, the

trust language in *White Mountain Apache* contemplated not merely the existence of an express trust but the government's "actual use" through "daily supervision" and "daily occupation." 537 U.S. at 475. In expressly investing the government with authority to use and to control the trust corpus, the statute facially provided that specific fiduciary duties would attach to that use. *Id.*

Accordingly, the existence of a duty was apparent from the text of the statute in *White Mountain Apache*. The Court looked to the common law only to determine the availability of damages for breach of that duty. The Court emphasized that general trust law played no further role. "To find a specific duty," the Court reasoned, "a further source of law was needed to provide focus for the trust relationship." *White Mountain Apache*, 537 U.S. at 477. It was only "once that focus was provided" that "general trust law was considered in drawing the inference that Congress intended damages to remedy a breach of obligation." *Id.*; *see also Navajo I*, 537 U.S. at 514 (Souter, J., dissenting) ("the right to damages can be inferred from general trust principles") (citing, *inter alia*, *White Mountain Apache*, 537 U.S. at 472-73).

Justice Ginsburg, who wrote for the Court in *Navajo I*, explained in her concurring opinion in *White Mountain Apache* that the common law did not permit the creation of new trust obligations. *See* 537 U.S. at 479-81 (Ginsburg, J., concurring). The common law was an interpretive tool only because the 1960 Fort Apache act "expressly and without qualification employs a term of art ('trust') commonly understood to entail certain fiduciary obligations,

and 'invest[s] the United States with discretionary authority to make direct use of portions of the trust corpus.'" *Id.* at 480 (citations omitted) (alteration in original). The express language of the statute thus "created a trust not fairly characterized as 'bare,' given the trustee's authorized use and management." *Id.* at 481. It was the Act, therefore, and not the common law, that established the existence of the specific duties owed by the government.

It would be most remarkable if *White Mountain Apache*, a case decided on the very same day as *Navajo I*, required the *opposite result* in *Navajo I* based on a common law trust theory the Tribe also advanced in that case. *See* Brief for Respondent at 37, *United States v. Navajo Nation*, No. 01-1375 (arguing that "the character of the Government's trust duties *should* be explicated by accepted principles of trust law as a 'necessary expedient'") (citation omitted) (emphasis in original). But as Justice Ginsburg's separate opinion in *White Mountain Apache* demonstrates, the two decisions are easily harmonized. Here, unlike in that case, the most directly applicable statute does not use trust "terms of art" that connote the imposition of specific common law duties. Nor does the IMLA contemplate Secretarial control of either the tribal decision to lease minerals or the negotiated terms of those leases. The applicable statutes and regulations do not create *any* trust obligations whatsoever. *See White Mountain Apache*, 537 U.S. at 480 ("*Navajo* answers [the question of whether IMLA and its regulations impose any concrete substantive obligations, fiduciary or otherwise,] in the

negative."). In these circumstances, there is no role for the common law to play.

Rather than using the common law to *reinforce* the duties established by statute, the Court of Appeals' use of the common law actually *conflicts* with the statutory and regulatory scheme applicable to the Secretary's approval here. Nothing in this Court's Indian trust decisions permits this perversion of statutory obligations by the common law. The Court of Appeals' importation of common law trust duties is simply incorrect.

B. Judicially Engrafted Common Law Cannot Vary the Procedural Standards Established by Statute and Regulation

The importation of common law duties is especially unworkable because the Tribe seeks to engraft common law requirements onto the statutory procedures governing the Secretary's administrative functions. Congress had already spoken to the procedural framework applicable to the lease royalty adjustment decision through the Administrative Procedure Act ("APA") and regulations promulgated by the Secretary. Rather than reviewing the agency's compliance with that prescribed administrative process, the Court of Appeals overrode it in favor of vague common law duties.

This Court's decisions do not permit this judicial modification of administrative procedures. The Tribe's request for judicial augmentation of its procedural rights runs afoul of "the general proposition that courts are not free to impose upon agencies specific procedural requirements that have

no basis in the APA." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978)). This Court has for decades "emphasized that the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress confided the responsibility for substantive judgments." *Vermont Yankee*, 435 U.S. at 524. This principle is "'an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries they regulate and will be in a better position than the federal courts . . . to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.'" *Id.* at 525 (citation omitted).

This bedrock principle does not change merely because the federal government's general tribal trust responsibilities are implicated. This Court has never suggested tribal trust law was *primus inter pares* among the various interests addressed by federal law. Rather, the United States' general fiduciary duties to tribes are satisfied through compliance with statutes and agency regulations that balance those duties against other competing interests.

In *Nevada v. United States*, 463 U.S. 110, 142 (1983), the Court rejected the argument that the government cannot represent tribal interests in litigation where a statute also requires the government to represent competing interests relating to water reclamation. *See id.* at 128. While the United States "undoubtedly owes a strong

fiduciary duty to its Indian wards," that relationship must allow a Congressional accommodation of competing interests. *Id.* at 142. Where the government complies with such a statute, "the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests." *Id.*

The same principles apply in interpreting statutes of general applicability, such as the APA. For instance, this Court has refused to add a "tribal trust" exception to the legislatively crafted exemptions laid out in the Freedom of Information Act. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 15 (2001) (refusing to "read an 'Indian trust' exemption into" FOIA). Similarly, lower courts have found no reason to insert judicially created obligations into regulatory statutes merely because disputes over those statutes arose in the context of the government's fiduciary obligations to a tribe. "[A]lthough the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Morongo Band of Indians v. Federal Aviation Admin.*, 161 F.3d 569, 574 (9th Cir. 1998); *accord*

Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995).[3]

This Court's analysis in *Navajo I* is consistent with this approach. There, the Court examined the Tribe's breach of trust claims by asking whether the agency complied with its obligations under IMLA and its regulations. The Court reasoned that the imposition of fiduciary duties on the government "would be out of line with one of the statute's principal purposes," which was to encourage tribal management and control of its natural resources. 537 U.S. at 508. "The IMLA aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties." *Id.* Consistent with that purpose, the Court declined to read into IMLA a requirement that the Secretary conduct an independent economic analysis to determine the appropriate royalty rate. *Id.* at 511. It also refused to find that the Secretary's *ex parte* contacts were inappropriate because generally applicable Interior

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[3] *See also, e.g., Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) (federal government's trust obligation "alone . . . does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations"), *cert. denied,* 128 S. Ct. 176 (2007); *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 929-30 (10th Cir. 1994) (affirming ruling that "no breach of fiduciary duty had occurred because the government had enforced all applicable statutes and regulations"); *North Slope Borough v. Andrus*, 642 F.2d 589, 611-13 (D.C. Cir. 1980) (common law of trusts cannot impose additional duties beyond those owed by Endangered Species Act and National Environmental Policy Act).

Department regulations permitted consideration of matters outside the record. *See* 537 U.S. at 512-13. And it refused to find an enforceable obligation "to ensure a higher rate of return for the Tribe concerned." *Id.* at 511.

All of these determinations were made pursuant to statutes and regulations – IMLA and applicable Interior Department regulations – that balanced the interests of the Tribe with competing concerns, such as administrative efficiency and fairness or promoting tribal self-determination. Engrafting common law duties onto this regulatory scheme would upset that Congressional and administrative balance of interests.

Superimposing common law duties also subjects agency decision-making to indeterminate procedural requirements. In holding that the Secretary violated "common law trust duties of care, candor, and loyalty" in his approval of the leases, 501 F.3d at 1346, the Court of Appeals provided no guidance on how the Secretary should comply with these obligations in the future. The vague duties imposed by the lower court might be read to require the Secretary to conduct tribal-related business only in open meetings, to disclose internal Department deliberations to the Tribe, or to apply formal adjudicatory procedures to every tribal lease determination. But the Secretary's regulations set forth a generally applicable set of rules and guidelines for decision-making in the Department. Post-hoc judicial modification of these procedures can only lead to debilitating uncertainty for both the agency and private parties appearing before it.

Common sense and the fair administration of the laws dictate that common law standards must be rejected in this context.

III. THE SECRETARY DID NOT BREACH ANY DUTY TO THE TRIBE

Compliance with applicable statutes and regulations satisfied any duties that the Secretary had with regard to the administrative appeal and approval of the lease amendments. *Navajo I* carefully examined the Secretary's compliance with the applicable provisions and concluded that the conduct identified by the Tribe did not violate any duty. The development of the record since *Navajo I* has only reinforced that conclusion.

First, the very same procedures discussed by the Court in *Navajo I* would apply to the Secretary's actions whether conducted under IMLA, the Rehabilitation Act, or any other statute requiring Secretarial approval.[4] The informal review process

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[4] As the government demonstrates, there is no doubt that the Tribe's leases were "'governed *only* by the IMLA.'" Brief for the United States at 46 (citation omitted). But the Tribe's argument that the lease amendments were approved under the Rehabilitation Act would not change the regulations applicable to that approval. IMLA contemplates that its regulations apply to any leases issued pursuant to its terms or those of "any other Act affecting restricted Indian lands. . . ." 25 U.S.C. § 396d (1985); *see also* 25 C.F.R. pt. 211 (1985) (citing § 396d among authorities for promulgation of regulations). The Rehabilitation Act's lease approval provision (assuming it even applies to mineral leases at all) applies specifically to restricted lands, 25 U.S.C. § 635(a) (1985); thus, the same IMLA regulations would apply to that approval. *See* 25 C.F.R. § 211.29 (1985) (IMLA regulations "shall apply to leases made

(Continued …)

discussed by this Court in *Navajo I* was compelled not by IMLA, but by *generally* applicable Department regulations governing appeals from a decision of an Area Director. *See* 25 C.F.R. §§ 2.2, 2.3 (1985). As discussed in more detail below, this Court found no breach of those regulations.

Second, the evidence added to the record after *Navajo I* has not provided any basis for a different conclusion. On the contrary, it confirms that the Tribe was well aware of the dual procedural paths identified by this Court and chose to follow an informal one permitting both *ex parte* contacts and the administrative stay imposed by the Secretary. In fact, the record shows that the Tribe had the same contemporaneous understanding of the procedural framework as the Court declared in *Navajo I*.

Finally, there is nothing to change the Court's conclusion that, under the relevant statute and regulations, the Tribe was entitled to make its own decision as to what was in its best economic interests. At the time the Secretary encouraged further negotiations, the Tribe and *amici* had a number of outstanding disputes, including the Tribe's request for increases in the coal royalty and water payment rates established under another lease (Lease 9910) and the scope of the Tribe's taxing authority. None of these disputes would have been resolved either by an agency decision in the administrative appeal regarding Lease 8580, or in

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by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior").

further litigation that would have resulted from such a decision. The evidence added to the record since the Court's decision confirms that the Tribe made the conscious decision to continue negotiations – opting for a negotiated resolution that wrapped up all outstanding issues involving *both* of its leases with Peabody instead of prolonged litigation regarding only the royalty rate under Lease 8580.

A. *Ex Parte* Contacts Were Not Improper

The Tribe continues to rely on the *ex parte* meeting between the Secretary and a Peabody representative as a basis for its breach claim (*see* Respondent's Opp'n to Petition ("Opp'n") at 11-12, 29 n.15), but this Court previously rejected the argument that this meeting "'skewed the bargaining'" process. *See* 537 U.S. at 510 (citation omitted). *Navajo I* concluded that nothing in the applicable statutes and regulations "proscribed the *ex parte* communications in this case, which occurred during an administrative appeal process largely unconstrained by formal requirements." *Id.* at 513 (citing 25 C.F.R. § 2.20 (1985)).

This conclusion applies with no less force in the context of the Tribe's renewed "network" argument. In particular, 25 C.F.R. § 2.3(a) (1985) provided that decisions made by the BIA Area Director may be appealed to the Commissioner of Indian Affairs, a function then being exercised by Deputy Assistant Secretary Fritz. As this Court observed in *Navajo I*, the informal review process applicable to that appeal did not prohibit *ex parte* contacts. 537 U.S. at 513. These same procedures would govern review of the

Area Director's proposed royalty rate adjustment under the Tribe's "network" theory.

In addition, the Tribe fully understood that *ex parte* contacts were permissible during the rate adjustment process. In fact, it unilaterally initiated the adjustment process through a series of *ex parte* contacts. In a March 28, 1984 letter privately sent to the Secretary, the Tribe requested a reasonable royalty rate adjustment on Lease 8580 to a minimum of 12.5%. JA 372-74. Again, in April 1984, the Tribe sent two private letters requesting a royalty adjustment to Area Director Dodge, providing Dodge two studies purportedly justifying a royalty rate in excess of 12.5%. Supplemental Appendix of *Amici* at 4a-6a ("Supp. App.").[5] At the time, *amici* were unaware of the Tribe's unilateral efforts to obtain the rate adjustment because neither the Tribe nor the Area Director included *amici* in these communications.

On June 18, 1984, after Area Director Dodge issued an opinion letter recommending a 20% royalty rate on Lease 8580, he sent separate letters to the two parties, one to the Tribe explaining that this recommendation was made "in consultation with the Navajo Nation's Minerals Department and Department of Justice," and the other to Peabody omitting this language. *Compare* Supp. App. 7a *with* JA 8-9. At the time, *amici* were neither provided a

[5] For the convenience of the Court, the attached Supplemental Appendix reproduces record material not in the Joint Appendix.

copy of the Dodge letter to the Tribe, nor informed of the Tribe's role in procuring the 20% royalty rate recommendation.

After *amici* appealed the Area Director's action, the Tribe continued to avail itself of the informality of the process. For example, a May 1985 memorandum, which was added to the record only after *Navajo I*, shows that the Tribe's counsel contacted the Department lawyer responsible for drafting the decision in *amici*'s royalty rate appeal and learned that the Deputy Assistant Secretary was close to issuing a decision favorable to the Tribe. JA 413-14 (discussing conversation with Colleen Kelley, Office of the Solicitor); *see* JA 507. The Tribe's expert, Ahmed Kooros, also "talked with BIA technical staff" responsible for making recommendations on the appeal and learned that they had recommended affirming the 20% royalty rate. JA 414.

Based on what the Tribe learned from its *ex parte* contacts, the Tribe suspended negotiations with *amici* on July 1, 1985 because it anticipated an imminent, favorable decision. JA 99, 154-55, 416. In response, on July 5, 1985, Peabody wrote directly to the Secretary, copying the Tribe and urging the Secretary to postpone any decision in the appeal in favor of a voluntary, negotiated settlement. JA 98-100. Shortly thereafter, Stanley Hulett met privately with the Secretary and repeated Peabody's written request to postpone any decision to allow further negotiations. *See* 537 U.S. at 497; *see also* JA 102.

The Tribe "submitted its own letter urging the Secretary to reject Peabody's request," 537 U.S. at 497, and professing a lack of knowledge of an imminent, favorable decision. JA 420-21. Documents added to the record since *Navajo I* demonstrate that the Tribe's chairman, Peterson Zah, nevertheless met *ex parte* with Assistant Secretary Fritz "to express [his] concern that no decision had been reached" in the appeal. JA 452.

These contacts by both sides were not impermissible, but were part and parcel of an administrative process designed to promote the free flow of information to policymakers. Each party was exercising its constitutionally protected right to petition the Interior Department within the framework of the APA. *See, e.g.*, *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). As this Court concluded, nothing prohibited such *ex parte* communications in this context.

B. The Secretary's "Intervention" Was Permissible

The Tribe also contends that the Secretary breached a duty owed the Tribe by intervening in the decision-making process to stay the appeal to permit further negotiations between the parties. Opp'n at 12-13, 15. *Navajo I* ruled that the Secretary's personal intervention did not constitute a breach, recognizing that "[a]s head of the Department . . . , the Secretary had 'authority to review any decision of any employee or employees of the Department.'" 537 U.S. at 512 (quoting 43 C.F.R. § 4.5(a)(2) (1985)); *see also id.* at 498 n.4. Indeed, this Court held that, even if the Deputy had affirmed the 20% royalty

rate, "it would have been open to the Secretary to set aside or modify his subordinate's decision." *Id.* at 513. Thus, the Secretary could have intervened either before or after the Deputy's decision, and "rejection of Peabody's appeal by the Deputy Assistant Secretary would not necessarily have yielded a higher royalty for the Tribe." *Id.* at 514.

The Tribe was well aware of Peabody's request that the Department withhold action in the royalty rate proceeding to allow the parties to pursue a negotiated resolution. Peabody first made this request to Secretary Hodel in the July 5, 1985 letter that was copied to the Tribe. *Id.* at 497. Secretary Hodel later adopted and issued a memorandum suggesting that Deputy Assistant Secretary Fritz "'inform the involved parties that a decision on the appeal is not imminent'" and encourage the parties to "'resolve this matter in a mutually agreeable fashion.'" *Id.* His memorandum "was 'not intended as a determination of the merits'" of the appeal. *Id.* at 498.

The Department had repeatedly advised the parties of its preference for a negotiated settlement. Brief for the United States at 8 n.2. Indeed, the Secretary's direction to encourage settlement was entirely reasonable in light of other difficult disputes then outstanding between the parties. For example, the Tribe had already requested the Secretary's assistance in obtaining a "voluntary adjustment" in the royalty rate under its other Peabody lease (Lease 9910) because that lease had no royalty adjustment clause. JA 373; 537 U.S. at 498 n.5. The coal under Lease 9910 was jointly owned by the Navajo and

Hopi Tribes, and the Tribes were obligated to share the proceeds from this coal. *See* 25 U.S.C. § 640d-6. Peabody's lease with the Hopi Tribe for the Hopi share of the Lease 9910 coal also had no royalty or other reopener provision. JA 250-52. Because Peabody's mining operation was progressing southward in the direction of the Lease 9910 coal, the parties anticipated that the production of this jointly owned coal would increase. *See*, *e.g.*, JA 349.

Lease 9910 also contained the rates paid by Peabody to the Tribe for water used in the mining operations, including water used in the long slurry pipeline that delivered coal to the Mohave Plant. JA 222-23. The Navajo and Hopi Tribes shared payments for this water, and both Tribes had demanded significant increases, even though there was no contractual right to reopen the water rate. JA 222-23, 248-49, 390, 434.

Moreover, in the aftermath of *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), the parties continued to have substantial disputes over the Tribe's taxing authority, including the validity of claimed back taxes, the combined burden of royalties and taxes, and the Tribe's authority to tax the coal jointly owned with the Hopi Tribe. *See, e.g.*, JA 433-34; Supp. App. 11a ¶¶ 20-21.

None of these and other outstanding disputes could have been resolved in the royalty rate proceeding. Indeed, many of these disputes required parallel negotiations with the Hopi Tribe to agree on comparable amendments to the Peabody-Hopi coal lease for the jointly owned coal. *See* JA 444-45. The Secretary also recognized that any decision on the

royalty rate appeal "will almost certainly be the subject of protracted and costly appeals." JA 117. The Secretary's action therefore encouraged a negotiated global resolution and avoided litigation narrowly focused on the royalty adjustment that "could well impair the future of the contractual relationship. . . ." *Id.*

The Tribe claims that an August 1985 letter from the Department "intentionally misled" the Tribe about the Secretary's action. Opp'n at 12. In this August 29, 1985 letter, however, Associate Solicitor Vollmann accurately stated that the appeal remained under consideration, and that a decision had "not yet been finalized." JA 125. Contemporaneous evidence added to the record on remand now confirms that the Tribe understood the Secretary's involvement and his suggestion to encourage settlement. According to tribal records, when tribal officials met with Fritz, he "explicitly stated that he would not decide Peabody's appeal until the Navajo Tribe made a final attempt to negotiate with Peabody to avoid further litigation." JA 452. The July 18, 1986 minutes of the Navajo Tribal Council confirm the Tribe's understanding: "[the] status of the Interior appeal is the Secretary had asked Peabody and the Navajo Nation to sit down and try to work out their differences on that. He indicated an unwillingness to act on this until we have given it one last shot." JA 465.

Thus, as this Court concluded in *Navajo I*, because the Secretary acted within his plenary discretion under the Department's regulations, his purported "intervention" did not constitute a breach.

C. The Tribe Could Have Compelled a Decision on the Royalty Rate but Chose to Negotiate

In *Navajo I*, this Court also held that the applicable regulations provided that either party could have *compelled* a prompt ruling or a more formal administrative proceeding. 537 U.S. at 496 n.3 & 513. This alone defeats the Tribe's argument that its bargaining position was undermined by the Secretary's suggestion to defer action on the appeal. *Id.* at 513-14. Any written request from the Tribe for a ruling would have resulted in either a decision by the Deputy Assistant Secretary within thirty days or, failing that, an automatic transfer of the appeal to the Interior Department's Board of Indian Appeals for formal administrative proceedings. *Id.* at 496 n.3.

Those same procedures were available to the Tribe regardless of any asserted network of statutes. In fact, the Tribe was contemporaneously aware of its right to request prompt action or a more formal administrative proceeding. The record on remand shows that, in December 1985, the Navajo Attorney General provided a confidential memorandum to the Tribal Chairman proposing that the Tribe write to the Deputy Assistant Secretary "requesting a written decision by him on the matter within 30 days," as provided by Departmental regulations. JA 454; *see also* 537 U.S. at 496 n.3 (discussing 30-day rule). In July 1986, the Tribal Council was assured that "the Secretary could decide [Peabody's] royalty appeal" if the Tribe chose not to continue negotiations. JA 465. Numerous other documents demonstrate that the

Tribe understood its available procedural options. *See* JA 12, 448, 452-53. Thus, from mid-1985 until 1987, the Tribe made a conscious choice to negotiate rather than invoke these remedies, and it cannot blame the Secretary for its decision to forego them. *See* 537 U.S. at 513.[6]

The Tribe recognized good reasons to continue to negotiate with *amici*. *See*, *e.g.*, JA 432-35, 442-43. For example, in August 1984, the Tribe's Director of the Minerals Department wrote to the Tribal Attorney General encouraging a negotiated solution to the royalty rate appeal. JA 388-91. His memorandum cited the litigation risk of having a court reinstate the original cents-per-ton rate, significant deficiencies in the analyses underpinning the 20% rate, "active[] lobbying [by Peabody and the utilities] with the Department," and the ability to address other issues in a negotiated resolution, such as increases in the water payments and royalties under Lease 9910. *Id.* Another tribal legal memorandum emphasized that, if challenged in court, the Tribe could lose any right to an adjustment because Dodge's 20% opinion was untimely: "[B]y waiting until [after February 1984] to require Secretarial notification of royalty adjustments, we

[6] Although the Tribe claims that it was forced to negotiate due to economic pressures, additional evidence submitted on remand also shows that the Tribe decided against exercising another procedural option, which permitted the Tribe to request that the Area Director's action become effective immediately during the pendency of the administrative appeal. Supp. App. 1a-3a; *see* 25 C.F.R. § 2.3(b) (1985).

may well have forfeited any possibility of receiving an adjusted royalty until 1994. . . ." JA 377-78. The Tribe's chief negotiator in 1985, Michael Nelson, testified that "there [are] other things that we felt we were getting out" of the negotiations and "the big one is that the royalty rate on the south lease [9910] was going up, too. . . ." JA 349; *see also* JA 465 (Nelson informing Tribal Council that negotiations "have borne some fruit").

In the end, the Tribe did not avail itself of its right to demand a decision from the Deputy Assistant Secretary. Thus, his postponement of a decision was not only permissible under the regulatory scheme, but carried with it an antidote known to the Tribe – its right to request either an immediate decision or formal administrative proceedings before the Board of Indian Appeals. Having eschewed both options, the Tribe, as a matter of law, has no claim based on delay.

D. The Lease Amendments Negotiated by the Tribe, Including the 12.5% Rate, Are Fair and Reasonable

The Tribe's central complaint in this case is that the lease amendments, though negotiated by the Tribe, were "unfair to the Navajo." Opp'n at 14. The Tribe's contention would undermine a principal purpose of IMLA – "to enhance tribal self-determination," 537 U.S. at 494, and to "empower[] Tribes to negotiate mining leases themselves," *id.* at 508. In any event, the Court squarely rejected the Tribe's economic argument in *Navajo I*, and there is nothing about the present context that would yield a different result.

First, as the Court previously concluded, none of the applicable statutes or regulations provided "guides or standards circumscribing the Secretary's affirmation of coal mining leases negotiated between a Tribe and a private lessee." *Id.* at 510. *Navajo I* specifically rejected the Tribe's contention that the Secretary labored under a duty to ensure a higher rate of return or to conduct an independent economic analysis. *Id.* at 511 & n.16. Regardless of its statutory basis, the Secretary's approval function required him only to ensure a royalty rate in excess of 10 cents per ton; the approved leases were well in excess of this "bare minimum royalty" rate. *Id.* at 510-11 & n.15.

Second, this Court concluded that the 12.5% rate negotiated by the Tribe and approved by the Secretary "was at the time customary for leases to mine coal on federal lands and on Indian lands." *Id.* at 498 & n.6. Indeed, "the customary rate for coal leases on Indian lands issued or readjusted after 1976 did not exceed 12½ percent." *Id.* at 511. This customary rate is confirmed by documents submitted into the record on remand. A 1998 report confirms that over 471 coal mining leases in the western United States signed or readjusted from 1985 to 1996 had royalty rates of 12.5% or less. *See* JA 540-42; *see also* 537 U.S. at 498 n.6.[7]

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[7] The Tribe contends (Opp'n at 8, n.3) that the 12.5% rate was not the "'standard' federal rate." In related litigation with the Hopi Tribe, however, the Tribe's expert witness concluded that the 12.5% rate "is the *standard royalty* received by the U.S. government for federally-owned coal, by state governments for state-owned coal and by many owners of

(Continued …)

Furthermore, the Tribe's own records demonstrate its contemporaneous belief that this rate was reasonable. An August 1984 memorandum from the Director of the Navajo's Minerals Department concluded: "The Minerals Department's opinion is that the [12.5%] royalty rate negotiated by the Chairman is reasonable. . . ." JA 388-89. Similarly, in a September 6, 1985 letter to the Navajo Chairman, the Tribe's expert consultant from the Council of Energy Resource Tribes, Ahmed Kooros, concluded that the package of lease amendments with a unified 12.5% royalty rate for all coal would "provide a 'reasonable' return to the Navajo Nation for its coal." JA 442-43. In August 1987, the Navajo Tribal Council approved the lease amendments, based on the determination that they were "in the best interest of the [Tribe.]" JA 473.

The amendments also provided additional benefits to the Tribe, including: retroactive payments of the 12.5% royalty on Lease 8580 to February 1984; a $1.5 million bonus payable upon approval of the amendments; substantially increased payments for water use; scholarships for tribal members; recognition of certain taxation on coal; and an increased royalty rate on Lease 9910 (effectively to 12.5%, split equally with the Hopi Tribe). 537 U.S. at 499-500; *see also* Supp. App. 9a-10a ¶¶ 12-14; JA 281-82, 287, 291-92, 293-98. Thus, these amendments resolved a cluster of complex issues

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privately-held coal reserves." JA 484 (emphasis added). *See* Brief for the United States at 10 & n.4.

affecting the future of Peabody's three leases with the Navajo and Hopi Tribes, none of which would have been addressed by an Interior Department decision on *amici*'s royalty rate appeal or the further administrative and judicial appeals *amici* would have pursued. *See* JA 99.

In *Navajo I* and again here, the Tribe complains that certain features of the negotiated amendments were unfavorable to it, such as the waiver of back taxes. *See* Brief for Respondent at 11-12, *United States v. Navajo Nation*, No. 01-1375; Opp'n at 13. Consistent with the purpose of IMLA, however, the Tribe made an informed business judgment to accept the entire package of inter-related amendments based on their overall benefits. *See*, *e.g.*, JA 377-91, 432-43, 454-61, 463-66, 472-74, 476-78, 517-19; Supp. App. 10a-11a ¶¶ 18, 20-21; *see also* JA 487-89 & Supp. App. 11a (explaining business justifications to abate back taxes to obtain other benefits).

The Secretary's approval of the negotiated amendments was not unreasonable. *See* 537 U.S. at 495 (where coal royalty exceeded ten cents, "[n]o other limitation was placed on the Tribe's negotiating capacity or the Secretary's approval authority"). In 1985, the Tribe negotiated amendments to two coal mining leases with other parties for other coal located on the Navajo Reservation, and the Department approved those lease amendments. Supp. App. 13a-29a. Those amendments provided for a royalty rate of 12.5% or lower, contained comparable tax waiver and royalty-tax cap provisions, and did not include up-front bonuses similar to those negotiated with *amici*. *See*

Supp. App. 13a-21a (Utah Construction Company); *id.* at 22a-29a (Pittsburg & Midway Coal Company). Likewise, in 1998, with full knowledge of the events at issue here, the Tribe negotiated amendments to *the very same Peabody leases at issue in this case* and reaffirmed the 12.5% royalty rate. JA 547-52. In 1999, the Secretary approved these subsequent amendments to the two Navajo leases as consistent with the "best interest" of the Tribe. JA 553-55.

In sum, *Navajo I* properly held that the Secretary did not breach any duty in approving the negotiated amendments in 1987, and evidence added to the record since then confirms that conclusion. The Secretary's action fully complied with all applicable statutes and regulations. As a matter of law, the Tribe has not demonstrated, and cannot demonstrate, a breach of duty.

CONCLUSION

For the reasons stated herein, this Court should reverse the decision of the Court of Appeals and direct entry of judgment for the United States.

Respectfully submitted,

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DECEMBER 3, 2008

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January 11, 1985

MEMORANDUM

TO: Louis Denetsosie, Deputy Attorney General
Resources Unit

FROM: Randy Harrison, Staff Attorney
Government Administration Unit

SUBJECT: Appeal of the Navajo Area Director's Adjustment of Royalty, Peabody Lease No. 14-20-0603-8580

By memorandum dated January 3, 1985, you asked that I research and finalize a motion that the Secretary of the Interior order Peabody to immediately begin paying royalties in the amount of 20% to the Navajo Tribe. I have researched and drafted such motion which is attached hereto.

* * * *

Please note that we may well be unable to convince the Commissioner to require Peabody to pay royalties to the Navajo Tribe during the pendency of this appeal. In the alternative we should ask that Commissioner make the Area Director's decision effective immediately and require the payment of such royalties into interest-bearing escrow during the pendency of this appeal. One final note is that based upon my research I believe pre-judgment interest is due from Peabody from the date the Area Director declared the royalties at 20% should we ultimately prevail.

* * * *

Louis Denetsosie
Deputy Attorney General
Paul Frye
Staff Attorney
Navajo Nation Department of Justice
Post Office Drawer 2010
Window Rock, Arizona 86515
(602) 871-6931

BEFORE THE COMMISSIONER OF INDIAN AFFAIRS DEPARTMENT OF THE INTERIOR WASHINGTON, D.C.

IN THE MATTER OF THE APPEAL OF THE NAVAJO AREA DIRECTOR'S ADJUSTMENT OF ROYALTY, PEABODY LEASE NO. 14-20-0603-8580	))))))	MOTION TO MAKE DECISION EFFECTIVE IMMEDIATELY AND TO REQUIRE PAYMENT OF ROYALTIES PENDING APPEAL

The Navajo Tribe, thought its attorneys, respectfully request that the Commissioner of Indian Affairs pursuant to 25 CFR §2.3(b) make immediately effective the Navajo Area Director's decision of June 18, 1984, to adjust the royalty rate on coal mined on lands leased from the Navajo Tribe under Lease No. 14-20-0603-8580 to 20% of the gross value of the coal.

Further, the Navajo Tribe requests Peabody Coal Co. be required to immediately begin payment to the Secretary of the Interior for the benefit of the Navajo Tribe the increase in the amount of royalties determined by the Navajo Area Director to be due. In the alternative, the Navajo Tribe requests Peabody Coal Co. be ordered to pay at least the minimum federal royalty of 12½% to the Navajo Tribe and the differ-

ence between the 20% determined by the Navajo Area Director and the 12½% minimum federal royalty be deposited in an interest-bearing escrow account for distribution upon resolution of the appeal.

Respectfully Submitted,

_____

Louis Denetsosie

THE NAVAJO NATION
Window Rock, Navajo Nation Arizona 86515
[Seal Omitted]

Peterson Zah
Chairman,
Navajo Tribal Council

Edward T. Begay
Vice Chairman,
Navajo Tribal Council

April 20, 1984

Mr. Donald Dodge
Area Director
Navajo Area Office
Bureau of Indian Affairs
P.O. Box M
Window Rock, Arizona 86515

Re: Adjustment of Royalty Provision of Peabody Coal Company Coal Mining Lease No. 14-20-0603-8580

Dear Mr. Dodge:

This is in reference to my letter to the Secretary of March 26, 1984 requesting the 20-year periodic adjustment of the royalty rate in the above lease. Further legal review reveals that the effective date of the lease was February 1, 1964 and hence the royalty provision has been subject to adjustment since February 1, 1984 and should be adjusted effective that date.

Your cooperation and assistance in enabling us to obtain a fair and equitable return from our coal resources will be greatly appreciated by the Navajo people.

Sincerely,

/s/ Peterson Zah
Peterson Zah
Chairman
Navajo Tribal Council

PZ:dw

THE NAVAJO NATION
Window Rock, Navajo Nation Arizona 86515
[Seal Omitted]

Peterson Zah
Chairman,
Navajo Tribal Council

Edward T. Begay
Vice Chairman,
Navajo Tribal Council

April 20, 1984

Mr. Donald Dodge
Area Director
Navajo Area Office
Bureau of Indian Affairs
P.O. Box M
Window Rock, Arizona 86515

Dear Mr. Dodge:

In my letter to the Secretary of March 26, 1984, I requested that the Tribe's Royalty rate be adjusted pursuant to Article VI page 7 of the Mining Lease between Sentry Royalty Company, (now Utah International Inc.) and the Navajo Tribe, Contract No. 1420-0603-8580 executed on February 1, 1984.

I also noted that your authority to make such adjustment, would arise at the end of twenty years from the effective date of the lease which I suggested was August 28, 1984. In this I was in error. Further review of the lease reveals that it's "effective date" was February 1, 1964. The first sentence of the lease so provides (a copy of the first page enclosed) and there is nothing in the remainder to suggest to the contrary. It is therefore clear that since February 1, 1984 you have had the authority to adjust the Tribe's Royalties. As you are aware the minimum Royalty rate on Federal lands is 12½%, 30 U.S.C. 207.

This it should be noted is the minimum not maximum rate. We believe that a very persuasive argument can be made for adjusting the Tribes Royalty Rate substantially above the 12½% minimum. See for example the reports of F.R. Schwab & Associates, Inc. and the Council of Energy Resource Tribes which are enclosed.

Without question, however, the Tribe is entitled to the minimum rate. We therefore request you to immediately adjust the Tribe's Royalty to the Federal minimum rate of 12½% effective February 1, 1984 and afford the Tribe 180 days within which to provide support for any further adjustment that might be warranted.

Sincerely,

/s/ Peterson Zah
Peterson Zah
Chairman
Navajo Tribal Council

PZ:dw

Navajo Area Office
P.O. Box M
Window Rock, Arizona 86515-0714

LEGAL / CONFIDENTIAL

ARPM/Minerals

CERTIFIED MAIL—
RETURN RECEIPT REQUESTED

Mr. Peterson Zah
Chairman, Navajo Tribal Council
P.O. Box 308
Window Rock, Arizona 86515

Re: Readjustment of Peabody Royalty
Lease No. 14-20-0603-8580

Dear Mr. Zah:

Enclosed is a copy of my notice to Peabody Coal Company adjusting the royalty on the above-referenced lease to 20.0 percent. The new royalty rate will be effective August 28, 1984.

In making this adjustment my staff has acted in consultation with the Navajo Nation's Minerals Department and Department of Justice. I believe that the Navajo Nation supports my decision.

In response to your letter dated April 20, 1984, my staff and the Office of the Field Solicitor have researched your request to make the royalty adjustment retroactive to February 1, 1984. This research convinces me that there was no legal basis to adjust the royalty in February because the original lease was not effective until August 28, 1964, when it was approved by the Secretary. Neither the Bureau nor the law recognizes a lease of tribal trust lands as

being effective until the lease is approved by the Secretary.

Sincerely,

Area Director

Enclosure

cc: Field Solicitor - Window Rock

ARPM/Minerals
Chrono
300
M/F

AFFIDAVIT OF AKHTAR ZAMAN

STATE OF ARIZONA)
) ss.
COUNTY OF APACHE)

I, Akhtar Zaman, being first duly sworn state as follows:

1. I am the Director of the Minerals Department of the Division of Natural Resources of the Navajo Nation. I am responsible for administering the laws and programs of the Nation relating to minerals development, including both the Black Mesa and Kayenta Mines operated by Peabody Coal Company. In addition, I was a member of the Navajo Negotiating team which negotiated the recent amendment to the Navajo Lease and the Navajo Joint Use Area Lease with the Peabody Coal Company and am familiar with the terms and operations of those leases.

2. The Peabody Coal Company operates two mines within the exterior border of the Navajo Nation. The Kayenta Mine, which supplies coal by a private rail line to the Navajo Generating Station near Page, and the Black Mesa Mine which supplies coal by coal slurry pipeline to the Mohave Plant.

3. Peabody operates the two mines under three different lease agreements which cover two different geographic areas.

* * * *

12. In 1987, the Hopi and Navajo Tribes entered into a package of renegotiated leases with the Peabody Coal Company covering the FJUA and Navajo leasehold areas. The resulting leases provide a unified royalty rate of 12.5% for all coal mined by Peabody Coal Company. The royalty rate for the Navajo

Lease was adjusted retroactive to February 1, 1984. The royalty is shared equally by the Navajo and Hopi Tribes for coal mined from the FJUA Leases.

13. The renegotiated Peabody leases included many important changes in the original lease provisions, including the dedication of additional coal reserves to Peabody by both the Hopi and Navajo Tribes, signing bonuses of $1,500,000 to each Tribe per lease, separate contributions to tribal scholarship funds for each Tribe, and a separate annual advance payment to the Hopi Tribe to compensate for the fact that the mining operation is not on the HPL, and greatly increased water rates shared equally by the tribes without regard to the location of the water sources, the majority of which are located in Navajo land.

14. The amended Navajo and Navajo FJUA Leases include a cap on the royalties and taxes which the Navajo Tribe may collect from Peabody Coal Company, as well as a partial affirmation by Peabody of Navajo taxing authority and jurisdiction. The Hopi lease Amendment does not have such a cap provision.

* * * *

18. A continuation of the tax waiver extended to the Page Power Plant was, to the best of my knowledge, Peabody's and its utility customers' major concern in any discussion of increased royalty rates for either the Hopi or Navajo Tribes. The Navajo Negotiating Team believed, at the time, that the original tax waiver, as expressed in the 1969 lease, had at least some continuing validity, and therefore chose to reaffirm that waiver's validity in exchange for higher royalty returns and supplemental benefits for both Tribes.

* * * *

20. The decision made by the Navajo Negotiating Team to abate certain back taxes owed by Peabody Coal Company on the Black Mesa Mine was difficult indeed. The Team believed that the Navajo Nation had a valid claim to those taxes in spite of some legal complications involved in trying to collect those back taxes. The Team believed that a timely increase in royalty rates and supplemental benefits for FJUA and Navajo coal leases was a goal worth achieving, and in consideration of the uncertainty of collection of the back taxes, notwithstanding the partial affirmation of Navajo taxing authority in the leases, combined with the high legal costs that were certain to result if the Navajo Nation pursued the claim the Team concluded that the Amendments to the agreement were, if not perfect, at least more acceptable than the status quo.

21. The Navajo Negotiating Team knew at that time that abating the Navajo back-taxes would accelerate the negotiations and would immediately result in higher rates of royalty return and other benefits to both the Navajo and Hopi Tribes. These negotiations had dragged on for a number of years, and each year that passed without new lease agreements cost both the Navajo Nation and the Hopi Tribe a great deal in lost royalty payments, due to payments at the old royalty rate while negotiations continued. The Hopi Team was aware of the Navajo plan to agree to abate back taxes, yet did not then assert a claim to one half of the back taxes being abated. Had the Navajo Negotiating Team known of a Hopi claim to one half of the back taxes owed by Peabody, I am quite certain that the Navajo Team would have acted differently in the negotiations.

* * * *

DATED this 28th day of October, 1991.

/s/ Akhtar Zaman
Akhtar Zaman

SUBSCRIBED AND SWORN TO before me this 28th day of October, 1991.

/s/ [Illegible]
Notary Public

My Commission Expires:
2-14-92

AMENDMENT NO. 4
AND SUPPLEMENT
(Corrected)

To Contract No. 14-20-603-2505,
"Mining Lease—Tribal Indian Lands",

between THE NAVAJO TRIBE OF INDIANS

and

UTAH CONSTRUCTION COMPANY

This Amendment No. 4 and Supplement ("Amendment No. 4") entered into as of the 25th day of April, 1985 (the Effective Date as defined in Section 18) by and between THE NAVAJO NATION, also known as the Navajo Tribe of Indians (hereinafter sometimes referred to as "Lessor") and UTAH INTERNATIONAL INC., formerly named Utah Construction Company, a Delaware Corporation (hereinafter referred to as "Lessee"),

WITNESSETH:

WHEREAS, Lessor and Lessee entered into that certain Indenture of Lease dated July 26, 1957, Contract No. 14-20-603-2505, (said contract hereinafter referred to as the "Basic Lease") and subsequently entered into amendments to said Basic Lease as follows: Amendment No. 1 dated October 18, 1957, Amendment No. 2 dated October 24, 1961 and Amendment No. 3 dated March 29, 1965;

WHEREAS, the parties desire that certain provisions of the Basic Lease, as heretofore amended, be omitted or modified and that certain other provisions be added to said Basic Lease;

* * * *

WHEREAS, the Lessor wants to obtain a fair rate of return on its resourses used or sold by Lessee; and

NOW, THEREFORE, the parties hereto agree as follows:

1. Subparagraph 3(a) of the Basic Lease is hereby revised to read in full as follows:

"(a) ROYALTY.

To pay, or cause to be paid, to or for the use and benefit of the Lessor, or directly to Lessor, at Lessor's option, as royalties on coal mined pursuant to this lease (the "Basic Lease") the sums of money as follows, to wit:

(i) Commencing on the Effective Date, for all coal mined by Lessee from the leased premises by underground methods (including auguring) and sold, except as provided in Subparagraphs 3(a)(v), (vi), (vii) and (viii) below, a royalty for each ton of coal (2,000 pounds not including bone coal or other impurities) equal to the greater of (A) eight percent (8%) of the value of the coal (as hereinafter defined) or (B) such other royalty of general application established by law or regulations of the United States from time to time pursuant to the Mineral Lands Leasing Act (Ch. 85, 41 Stat. 437)(1920), codified in scattered Sections of 30 U.S.C. (the "Mineral Lands Leasing Act"), as amended, and regulations thereunder as the minimum royalty payable for coal mined by underground methods under Federal coal leases thereafter issued, F.O.B. the mouth of the mine from which such coal is mined.

(ii) Commencing on the Effective Date, for all coal mined from the leased premises by surface mining methods and sold, except as provided in Subparagraph 3(a)(v), (vi), (vii) and (viii) below, a royalty for each ton of coal (2,000 pounds not including bone coal or other impurities) equal to the greater of (A) twelve and one-half percent (12-1/2%) of the value of the coal (as hereinafter defined) or (B) such other royalty of general application established by law or regulation of the United States from time to time pursuant to the Mineral Lands Leasing Act, as amended, and regulations thereunder as the minimum royalty payable for surface minable coal under Federal coal leases thereafter issued, F.O.B. the mouth of the mine from which said coal is mined.

(iii) For purposes of calculating the royalties payable hereunder, the value of the coal shall be determined in the same manner as the value of coal F.O.B. the mouth of the mine for Federal royalty purposes under the Mineral Lands Leasing Act, as amended, and regulations thereunder, and shall include any Tribal taxes lawfully imposed so long as federal or state taxes are included in determining the value of coal for Federal royalty purposes.

* * * *

(iv) As used herein, "Tax Provisions" refers to Subsections 11(e) and 12(e) of the Supplemental and Additional Indenture of Lease, dated July 6, 1966, between Lessor and Arizona Public Service Company, El Paso Elec-

tric Company, Public Service Company of New Mexico, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company and Tucson Electric Power Company ("the Four Corners Participants"), and to the last paragraph of Section 6 of the Indenture of Lease, dated December 1, 1960, between Lessor and Arizona Public Service Company, as amended. Said Indenture of Lease and Supplemental and Additional Indenture of Lease, as amended, shall hereinafter be referred to as the "Power Plant Lease."

As used herein, "Enforcement Action" refers to any action taken by the Navajo Nation prior to July 6, 2001, or action taken after July 6, 2001, if such action relates to any period prior to said date, against Lessee or the Four Corners Participants to collect taxes, including the institution of any administrative collection proceedings; the institution of litigation seeking judgment for taxes due; the seizure or sale of property pursuant to a lien for taxes due; the use of police power to compel suspension of operations or effect exclusion from lands under the jurisdiction of the Navajo Nation for failure to pay taxes; or the actual collection after written demand by resolution of the Navajo Tax Commission of taxes by the Navajo Nation from Lessee or the Four Corners Participants. Enforcement Action shall not include the filing of any action for a Secretarial determination pursuant to Section 32 of the Supplemental and Additional Indenture of Lease dated July 6, 1966, as amended, or for

declaratory relief by the Navajo Nation in a Federal court seeking a determination of the validity of the Tax Provisions or whether a particular tax of the Navajo Nation is in conflict with the Tax Provisions.

(v) In order that the Navajo Nation may have flexibility with respect to future exercise of its governmental taxing powers, the Navajo Nation shall be entitled to take Enforcement Action to collect any tax which, in accordance with Subparagraph 3(a)(ix) below, is deemed to be in conflict with the Tax Provisions. However, in the event the Navajo Nation takes Enforcement Action with respect to any tax deemed to be in conflict with Tax Provisions, the royalties set forth in Subparagraphs 3(a)(i) and (ii) shall, except as hereinafter provided, and only with respect to coal sold to the Four Corners Participants and burned at the Four Corners Power Plant, be reverted, after receipt by the Navajo Tax Commission of Notice that Lessee or the Four Corners Participants considers that an event specified in said Notice gives rise to reversion, to fifteen cents per ton (2,000 pounds not including bone coal or other impurities) with respect to coal mined from the lands covered by the Basic Lease or by Amendment No. 2 thereto, and twenty cents per ton (2,000 pounds not including, bone coal or other impurities) with respect to coal mined from the lands covered by Amendment No. 3 to the Basic Lease, those being the royalties in effect prior to the execution of Amendment No. 4 to the Basic Lease.

* * * *

(ix) For the purposes of Subparagraphs 3(a)(v) and, (vi) and (vii) hereof only, and without limiting or affecting the provisions of Subparagraph 3(a)(x) hereof, the Lessor, the Lessee and the Four Corners Participants agree that (A) the taxes imposed under Business Activity Tax, including amendments, of the Navajo Nation shall be deemed to be in conflict with the Tax Provisions if the Navajo Nation takes Enforcement Action with respect to said tax against Lessee, with respect to any of its operations as a coal supplier to the Four Corners Participants for their operation of the Four Corners Power Plant referred to in the Tax Provisions or against the Four Corners Participants with respect to any of their operations referred to in the Tax Provisions; (B) the taxes imposed under the Possessory Interest Tax, including amendments, of the Navajo Nation shall be deemed to be in conflict with the Tax Provisions if the Navajo Nation takes Enforcement Action with respect to said tax on any property interests of the Four Corners Participants referred to in the Tax Provisions; (C) the Possessory Interest Tax of the Navajo Nation or any similar tax enacted by the Navajo Tribal Council determined by reference to the value of property shall be deemed not to be in conflict with the Tax Provisions if the Navajo Nation takes Enforcement Action with respect to said tax on any property interest of Lessee or any successors in interest of Lessee; and (D) any subsequent tax enacted by the Navajo Na-

tion, except a tax within the scope of Subparagraph (C) above, shall be deemed to be possibly in conflict with the Tax Provisions if the Navajo Nation takes Enforcement Action with respect to said tax against the Lessee, but only with respect to any of its operations as a coal supplier to the Four Corners Participants for their operation of the Four Corners Power Plant referred to in the Tax Provisions, or against the Four Corners Participants, but only with respect to any of their operations or property interests referred to in the Tax Provisions.

(x) The Provisions of this Paragraph 3(a), including, without limitation, Subparagraph 3(a)(ix) above, shall not prejudice, nor constitute a waiver of, the right of Lessee or the Four Corners Participants to contest the validity or applicability of any tax of the Navajo Nation and shall not constitute a waiver of the Tax Provisions, nor shall the provisions of this Paragraph 3(a), including, without limitation, Subparagraph 3(a)(ix) above, prejudice or constitute a waiver of the right of the Navajo Nation to contest the validity, applicability or enforceability of the Tax Provisions. The Navajo Nation consents to be sued in Federal court, for declaratory and injunctive relief, on a claim that taxes demanded by the Navajo Nation are not due on account of the Tax Provisions. It is understood that the foregoing does not constitute a consent to any suit other than the type specifically described, and that in the case of a suit of the type specifically described, it does not constitute a waiver of

any defense other than sovereign immunity. Neither the provisions of this Paragraph 3(a), including, without limitation, Subparagraph 3(a)(ix) above, nor anything else herein shall constitute a ratification or reaffirmation of the Tax Provisions, or otherwise give any validity, effectiveness or scope to the Tax Provisions which they would not have as originally written. Neither the provisions of this Paragraph 3(a), including, without limitation, Subparagraph 3(a)(ix) above, nor anything else herein shall repudiate or invalidate, or otherwise diminish, the effectiveness or scope of the Tax Provisions. Finally, it is expressly understood and agreed that the Tax Provisions lapse and shall be of no effect after July 6, 2001.

* * * *

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be signed by their duly authorized officers as of the date hereinabove set forth.

THE NAVAJO NATION
Lessor

By /s/ Peterson Zah Sep. 25 1985
Chairman of the
Navajo Tribal Council

UTAH INTERNATIONAL INC.
Lessee

By /s/ [Illegible] Vice President

UNITED STATES DEPARTMENT
OF THE INTERIOR

By /s/ [Illegible] Sep. 25 1985
Area Director, Navajo Area
Pursuant to the Commissioner's
Redelegation Order 10, BIAM,
Section 3.1.

AMENDMENT TO EXISTING MINING LEASE
OF NAVAJO INDIAN LANDS

This is a Mining Lease Amendment, agreed to this 23rd day of July, 1985 by and between the Navajo Tribe of Indians (hereinafter referred to as the "Tribe"), and The Pittsburg & Midway Coal Mining Co., a Missouri corporation organized under the laws of the State of Missouri (hereinafter referred to as "Pittsburg").

WHEREAS, the parties to this agreement are currently parties to a "Mining Lease - Tribal Indian Lands" dated May 22, 1964 and approved by the Secretary of the Interior on September 18, 1964; and

WHEREAS, the parties both seek to make various amendments and modifications to the Lease, and to have this Lease, as amended, (hereinafter the "Lease") approved pursuant to the authority of the Indian Mineral Development Act of 1982 (25 U.S.C. § 2101 et. seq.); and

* * * *

WHEREAS, the parties agree that these amendments will allow Pittsburg to develop the remaining coal reserves in a reasonable manner with fair compensation paid to the Tribe and with proper consideration given to the protection of Tribal resources,

NOW THEREFORE, in consideration of the mutual covenants and the payments specified herein, the parties hereto agree as follows:

ARTICLE V (substituted)

Article V, Earned Royalty, of the Lease is hereby modified as follows:

EARNED ROYALTY

Pittsburg agrees to pay or cause to be paid to the Tribe, on or before the

twenty-fifth (25th) day of each succeeding month, royalties for the production from the preceding month, computed as follows:

COAL (a) For each ton of coal of two thousand (2000) pounds mined from the leased premises and sold by Pittsburg, as determined by actual railroad or truck scale weights or weightometer at its mine loading facilities, the following rates shall apply:

(1) For all coal sold during the four (4) year period immediately following the Effective Date of this Amendment, Pittsburg shall pay a royalty of six percent (6%) of gross realization.

(2) For all coal sold after four (4) years from the Effective Date of this Amendment, Pittsburg shall pay a royalty of twelve and one half per cent (12 ½%) of gross realization.

The term "gross realization," as used herein, means the weighted average sale or contract price per ton, f.o.b. the Mine Site, times the number of tons sold. For purposes of determining this gross realization, the price at the load-out on the Lease shall be deemed to be the price at the Mine Site.

* * *

ARTICLE XXV

MAXIMUM PAYMENT

The Tribe agrees that the total annual sum due to the Tribe from Pittsburg for Tribal royalties, taxes, and all other levies, charges, or payments in any form or of any kind, imposed with respect to or in connection with Pittsburg's McKinley Mine, its possession or any operations conducted pursuant to it, shall not exceed the "maximum payment", as defined below, subject to the applicable adjustments stated herein, and subject to the specific exceptions stated herein. The term "McKinley Mine" means the mine operated by Pittsburg in McKinley County, New Mexico, as shown on the map attached hereto as Exhibit 1. This "maximum payment" limitation shall not apply to or limit in any way the payment" limitation shall not apply to or limit in any way the payments required for:

(1) royalties on uranium and other minerals (Article V, (b) & (c));

(2) back taxes (Article XXVII);

(3) the scholarship fund (Article XXVIII);

(4) water use (Article XXIX);

(5) reasonable permit or application fees required for conducting various types of activities within the Navajo Nation;

(6) reasonable penalties or fines, whether payable to the Tribe or elsewhere, duly and lawfully imposed as a result of Pittsburg's actions on this Lease;

(7) fees, payments, benefits, or other charges required pursuant to the Federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq., Coal Mine Health and Safety Act, 30 U.S.C. § 801 et seq., as they may be amended, or by other applicable federal legislation, pursuant to which the Navajo Tribe or its members may benefit directly or indirectly;

(8) royalties and rents which are agreed or determined to be due the Tribe from lands other than these leased premises; and

(9) any other lawful obligations Pittsburg may have for activities other than those conducted pursuant to its operations at the McKinley Mine.

Nor are such payments to be included in the calculation of the "maximum payment."

* * *

ARTICLE XXVII

TAXES Subject only to the potential limit imposed by the "maximum payment" term of this contract, Pittsburg agrees to pay all lawful taxes imposed by the

Tribe. This agreement does not limit Pittsburg's rights to pursue any legal objection it may have to such taxes or tax levies in the appropriate forums. However, Pittsburg agrees to comply with valid and applicable Tribal laws and regulations regarding any such challenges or appeals.

The parties agree that payment of the sum of eleven million dollars ($11,000,000.00) by Pittsburg shall satisfy Pittsburg's obligations for any and all Navajo Tribal taxes accrued prior to the approval of this Amendment by the Navajo Tribal Council, imposed with respect to or in connection with Pittsburg's operations at the McKinley Mine.

* * *

ARTICLE XXVIII

SCHOLARSHIP FUND

In addition to the payments otherwise required by the Lease, and without any potential limitation due to the "maximum payment" term defined in Article XXV herein, Pittsburg agrees to make an annual contribution to the Navajo Scholarship Fund. Pittsburg shall pay the sum of one hundred thousand dollars ($100,000.00) to the Navajo Scholarship Fund in each calendar year during which it retains rights granted by the Lease. This sum shall be adjusted annually (but in no event to less than $100,000.00) based upon the percentage

change in the preceding year's Consumer Price Index (CPI-U) as published by the United States Bureau of Labor Statistics, for all urban consumers, United States city average, all items (1967=100).

* * *

ARTICLE XXIX

WATER USE

The Tribe authorizes Pittsburg for the life of the Lease to use the water resources of the Tribe, as they may be available in, on, or under the leased premises, as may be reasonable or necessary for its operations under this Lease. This authorization is subject to the condition that Pittsburg comply with the requirements of the Navajo Nation Water Code, and all reasonable conditions imposed pursuant to such Code, in using these resources. Navajo law will not be applied in such a manner as to unreasonably interfere with Pittsburg's right to use such water as provided herein. This provision expressly amends any inconsistent term of the Lease.

Pittsburg agrees to compensate the Tribe for all water produced by Pittsburg from subsurface sources for use on the Lease at the rate of one hundred and fifty dollars ($150.00) per acre foot of water. Such payment shall constitute the total compensation to the Tribe for such use, but does not include any reasonable application fees that may be

required. Pittsburg shall accurately monitor such water production and make such payments on a monthly basis. This obligation is not limited by the "maximum payment" term of Article XXV of this Amendment.

This water compensation rate shall be adjusted annually (but in no event to less than $150.00) based upon the percentage change in the preceding year's Consumer Price Index (CPI-U) as published by the United States Bureau of Labor Statistics for all urban consumers, United States city average, all items (1967=100).

* * *

WHEREFORE, the parties hereto have executed this Agreement on this 23rd day of July, 1985.

NAVAJO TRIBE OF INDIANS

By /s/ Peterson Zah
Peterson Zah, Chairman
Navajo Tribal Council

ATTEST:

/s/ Edward T. Begay
Edward T. Begay
Vice Chairman
Navajo Tribal Council

THE PITTSBURG & MIDWAY COAL MINING CO.

By /s/ R.M. Holsten
R.M. Holsten, President
The Pittsburg & Midway Coal Mining Co.

ATTEST:

/s/ [Illegible]
Secretary
The Pittsburg & Midway Coal Mining Co.

Approved, pursuant to the authority
of the Indian Mineral Development
Act of 1982, on this _____ day
of _____, 1985.

_____
Area Director Navajo Area Office
Bureau of Indian Affairs
U.S. Department of Interior